

Prashant J. Metha Vs. Senior Intelligence Officer

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Court : Kerala

Decided On : Jul-25-2013

Judge : Honourable Mr.Justice S.S.Satheesachandran

Appellant : Prashant J. Metha

Respondent : Senior Intelligence Officer

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE S.S.SATHEESACHANDRAN THURSDAY, THE 25TH DAY OF JULY 2013 3RD SRAVANA, 1935 Bail Appl..No. 4770 of 2013 ----- (OR.NO.3/2013 OF DIRECTORATE OF REVENUE INTELLIGENCE, COCHIN) ... PETITIONER/ACCUSED NO.1: ----- PRASHANT J.

MEHTA, S/O. JASHANTRAJ METHA, AGED 5 YEARS, MANAGING DIRECTOR, RAJESH EXPORTS LIMITED, COCHIN SPECIAL ECONOMIC ZONE, KAKKANAD, COCHIN. BY ADVS. SRI.KIRAN JAVALI SRI.BECHU KURIAN THOMAS SRI.PAUL JACOB (P) SRI.ENOCH DAVID SIMON JOEL SMT.TINA ALEX THOMAS SRI.S.SREEDEV SRI.RONY JOSE RESPONDENT(S): ----- SENIOR INTELLIGENCE OFFICER, DIRECTORATE OF REVENUE INTELLIGENCE, PALARIVATTOM, KOCHI -25, REPRESENTED BY SPECIAL PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. BY SRI.C.P.UDAYABHANU,CGC,DIRECTORATE OF REVENUE

INTELLIGENCE BY PUBLIC PROSECUTOR SMT. V.H.JASMINE THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 17-07-2013, THE COURT ON 25-07-2013 PASSED THE FOLLOWING: Kss "CR" S.S.SATHEESACHANDRAN, J.

----- B.A.No.4770 OF 201.() ----- Dated this the 25th day of July, 2013

ORDER

~~~~~ Petitioner is the first accused in a crime registered by the Intelligence Officer, Directorate of Revenue Intelligence, Ernakulam as O.R.No.3 of 2013 under Section 135 read with Section 104 of the Customs Act, 1962. He has filed the above application seeking the discretionary relief of anticipatory bail under Section 438 of the Code of Criminal Procedure (for short 'the Code').

2. Petitioner is the Managing Director of M/s.Rajesh Exports Limited operating business within the Cochin Special Economic Zone, Kakkanad, which has been given licence to export gold medallions manufactured from gold imported duty free. The Directorate of Revenue Intelligence, Cochin (hereinafter referred to 'DRI, Cochin') getting information that gold imported duty free by the Unit of the above Company in Kakkanad is being smuggled out by a gang headed by petitioner close surveillance was kept on such activities. On 10.5.2013, third accused employed in the Company, and an associate of B.A.No.4770/2013 2 petitioner, was intercepted at Ernakulam Railway Station while he was trying to board a train to Bangalore. Search over his person resulted in recovery and seizure of 900gms of gold. Disclosure statement made by him revealed that the gold was handed over to him by the second accused, Manager of the above Company, in the Unit at Special Economic Zone, Kakkanad. The gold was smuggled out from the Unit for being handed over to first accused, and that on previous occasions also such smuggling operations had been carried out from the gold imported duty free and handed over to petitioner in Bangalore. That disclosure led to arrest of second accused and, later, after recording their statements, both of them were produced before the Magistrate. Petitioner was proceeded as the first accused in the above crime registered for the smuggling of gold diverted from the imported duty free

stock in the Unit of the Company in the Special Economic Zone.

3. Petitioner, after unsuccessfully moving applications for anticipatory bail before the Sessions Judge, more than once, has filed the present petition seeking for such discretionary relief from this Court. A detailed objection to the petition with some annexures also has been filed by the Senior Intelligence B.ANo.4770/2013 3 Officer, DRI, Cochin, opposing the application. Petitioner is liable for prosecution under Section 135 and also for penal action under Section 112 of the Customs Act, 1962, in the facts and circumstances presented in the case is the thrust of the objections mainly contending that clearance of any duty free goods from the Special Economic Zone unauthorisedly to the domestic market will be considered as an import from an outside territory, and in such a case penal provisions of the Customs Act will apply with full force.

4. Learned counsel for petitioner advertent to the amendment made in Section 104 of the Customs Act contended that till the amendment came into force on 10.5.2013 the offence under Section 135 of the Act was only bailable. Where the DRI has set up a case that three transactions were much earlier before the commencement of the amendment and that the value of gold seized (900 gms), allegedly, from third accused on 10.5.2013 is taken, then, the case would not fall under Section 104(6)(c) of the Act is the submission of counsel. In that case, the offence, if any, made out on the allegations raised would still be bailable, is the submission of counsel. Conceding that an application for anticipatory bail cannot be maintained in respect B.ANo.4770/2013 4 of a bailable offence, learned counsel urged that if the submission made as above with reference to Section 104 of the Act in relation to the amendment referred to is accepted then this Court may dismiss the application observing that the offence is bailable, enabling the petitioner to get regular bail from the magistrate. Learned counsel also canvassed arguments that even if the offence is treated as non-bailable by virtue of the amendment made to Section 104 of the Customs Act, still, on the facts and circumstances presented petitioner cannot be penalised for the transaction which had taken earlier to the amendment. That would amount to penalising him under a retro active law, which is against the constitutional mandate. Value of materials alleged to have been smuggled out from the Unit of the Company in the Special

Economic Zone on four occasions together exceeded one crore, is the case of DRI to proceed against the accused, and where only one transaction, that too in respect of 900 gms of gold, allegedly, seized from the third accused on 10.5.2013 alone can be reckoned as having taken place after amendment of Section 104 of the Customs Act, it is submitted, invoking of Section 104(6)(c) of that Act is impermissible, and further it is violative since the petitioner B.ANo.4770/2013 5 cannot be proceeded under *ex post facto* legislation. Learned counsel has also referred to the definition of 'export' and 'import' in the Customs Act and also some provisions of the Special Economic Zones Act, 2005 to contend that to constitute an import or export the materials should have been either sent outside India or received from outside India. When that be so, according to counsel, criminal proceedings launched against petitioner by the DRI is *prima facie* unsustainable. Petitioner in the given facts of the case deserve to be granted pre-arrest bail is the submission of counsel, for extending such equitable relief to him.

5. Opposing the application learned counsel for DRI referring to the definition of 'smuggling' under Section 2(39) of the Customs Act submitted that a Special Economic Zone shall be deemed to be a territory outside a customs territory of India for the purpose of undertaking the authorised operations under Section 53 of the Special Economic Zones Act, 2005. When imported duty free stock in that Zone is diverted to the domestic market it is a clear case where such goods are liable for chargeable to duties of customs and further it is a clear case of smuggling, submits counsel. Evasion of customs duty over a B.ANo.4770/2013 6 period of time, some of which had taken place before the amendment of section 104 of the Customs Act came into force, would no way enable petitioner to contend that in respect of such transactions criminal proceedings launched against him should be governed by the provisions before amendment. It is only after apprehending of third accused with possession of 900 gms of gold and disclosure made by him previous transactions and evasion of duty came to light, and the continuous transactions carried out by the accused over the period of time have been rightly reckoned together to proceed against them as per the law in force and a clear case of non-bailable offence as under Section 104(6)(c) has been made out on the materials gathered by DRI, is the submission of counsel to contend that petitioner is not entitled to the discretionary relief of pre-arrest bail. In the given

facts of the case, and, statutory power vested with the customs officer to arrest petitioner and proceed against him in accordance with law, it may not be interfered with where the circumstances presented in the case prima facie disclose the serious offence imputed, is the further submission of counsel for dismissing the application. B.ANo.4770/201

6. I do not find any merit in the submission made by counsel for petitioner that previous transactions before 10.5.2013, on which date the amendment under Section 104 of the Customs Act came into force, cannot be taken into account for the purpose of determining whether the import of goods alleged exceeded the market price of one crore rupees envisaged under Section 104(6)(c) of the Customs Act. Section 104 deals with the power of arrest conferred on an Officer of Customs when he has reason to believe that any person has committed an offence under Section 132 or 133 or 135 or 135A or 136 of that Act. Where the offence related to prohibited goods or evasion or attempted evasion of duties exceeding Rs.50 lakhs sub section (4) states that it shall be treated as cognizable. In *Om Prakash and another v. Union of India and another* the Apex Court held that the offences under Section 135 of the Customs Act are bailable. After the above decision under the Finance Act, 2013, Act 23 of 2012, Section 104 has been amended by which evasion of duty or prohibitions which fall under clause (6) of Section 104 has been made as non-bailable offence. It is futile to contend that the evasions carried out previously should not be reckoned with an evasion made and B.ANo.4770/2013 8 detected after amendment for the reason that the offence committed on the previous occasion, then, constituted only a bailable offence. The tenability of such a contention has to be looked into examining the question whether amendment made with respect to an offence as to whether it is cognizable or non- cognizable, or, bailable or non-bailable under law, can be canvassed by a person proceeded for such offence to challenge that the amendment made would give rise to operation of retroactive law. Whether the offence is cognizable or non- cognizable, or bailable or non-bailable, all fall within the realm of procedure, and not under substantive law. What is prohibited under Article 20(1) of the Constitution is against conviction of any offence and imposition of penalty which might have been inflicted under the law in force when the offence was committed. In the first part of Article 20(1) falls conviction, and second part

relates to the punishment which may be inflicted on such conviction. So the second part will have application only if the first part is satisfied. In Shiv Bahadur Singh Rao v. State of Vindhya Pradesh [AIR 195.SC 394], the Apex Court has held that Article 20(1) prohibits conviction and sentence under ex post facto legislation, and not a trial under a procedure different from B.ANo.4770/2013 9 what was obtained at the time of commission of offence. The accused proceeded has no fundamental right to any particular procedural law or to be tried by a particular court. So much so, the offence which was earlier non-cognizable was later made cognizable, or bailable earlier changed to non-bailable by way of an amendment does not confer any right on the accused to contend that by such amendment any right under substantive law is infringed. No question of violation of any constitutional mandatory prescription arise when an offence is made 'non-bailable' from earlier 'bailable' by amendment of the provision. Petitioner cannot contend that each transaction alleged of in the case should be dealt with separately in invoking the offence under Section 135 of the Customs Act against him. He has no substantive right under law to claim for his prosecution treating each transaction separately where the offence was detected only later after the amendment, though some of the transactions had taken place before. So, in the present case where the DRI has found that the transactions carried out by the accused persons exceeded the value of one crore, a case falling under Section 104(6)(c) of the Customs Act, it is a non-bailable offence. In Hitendra Vishnu Thakur B.ANo.4770/2013 10 and others v. State of Maharashtra and others [1994(4) SCC 602], considering the scope of the amending Act whereby some provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 were amended, the Apex Court has observed that the procedure for grant of bail being procedural nature would operate retrospectively. So any argument canvassed with respect to provisions under Section 104 of the Customs Act, before and after amendment, that previously the offences were bailable and now some of them are non-bailable cannot come to the assistance of petitioner to contend that whatever offences continuously carried out by him in relation to the evasion of duty which was detected later after amendment has to be considered separately constituting only bailable offence. When all such transactions could be reckoned together for determining the quantum of value of goods where an offence over evasion of duty

is detected after the amended act, there is no merit in the plea made for treating the earlier transactions as constituting only bailable offences.

7. I do not find any merit in the submission made by counsel with reference to the definitions of 'import and export', and also some provisions of the Special Economic Zones Act, B.ANo.4770/201

2005. to impeach the proceedings initiated by the DRI in the case. Suffice to state the Customs Act provides for imposition of penalties when any goods are imported contrary to any prohibition imposed by or under the Act or any other law for the time being in force. Duty free goods imported in a unit of Special Economic Zone if it is brought to the domestic market without authority violating the statutory prescriptions, it is a clear case of evasion of customs duty, and, then, penalties covered by the Customs Act would apply with all force. On the facts and circumstances presented and looking into the objections raised by the DRI also, which I am not adverting to in detail to avoid any prejudice being caused to petitioner, it is a clear case having enough ground to suspect complicity of petitioner in the offence alleged, and this is not a fit case where petitioner can be extended the discretionary relief of pre-arrest bail. Conduct of petitioner also disentitle him to seek the discretionary relief as it is noticed that he had moved applications twice before the Sessions court. After the first application moved by him was dismissed, he moved another application before the same court. Strangely enough that was entertained and later disposed on merits by the learned Sessions B.ANo.4770/2013 12 Judge without taking note that the relief under Section 438 of the Code is purely discretionary and in the absence of an exceptional case showing that miscarriage of justice would follow if second application is not entertained, no party is entitled to move successive applications for such discretionary relief before the same court. After having been worsted twice before the Sessions Court, petitioner has approached this Court seeking the discretionary relief, which on the facts presented in the case, I find he is not entitled to. Petition is dismissed. sd/- S.S.SATHEESACHANDRAN JUDGE ps/25/7 //True copy// PA to Judge